

## Lawyer-As-Witness Rule Often Misunderstood

by

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It has been 12 years since the Minnesota Supreme Court last amended Rule 3.7 of the Minnesota Rules of Professional Conduct. Nevertheless, many lawyers remain unaware of the current content of the "lawyer-as-witness" rule. They call our office for a telephone advisory opinion and are often surprised to learn that the rule does not say what they thought it said, or at least not what they remember it to say.

It has long been considered improper for a lawyer to act as an advocate in litigation in which the lawyer's testimony was likely to be necessary, with limited exceptions allowed for situations where the testimony was uncontested, related only to the issue of the lawyer's fees or where substantial hardship to the client would occur. *See, e.g., Wilson v. Skogerboe*, 414 N.W.2d 521 (Minn. App. 1987) (improper); *Smith v. City of Owatonna*, 439 N.W.2d 36 (Minn. App. 1989) (exceptions apply).

Even prior to the adoption of Rule 3.7 of the Rules of Professional Conduct in 1985, this same general standard existed under the former Code of Professional Responsibility (DR 5-102). Nevertheless, application of the details of the present rule remains misunderstood by many.

One often-misunderstood aspect of Rule 3.7 is that it is limited in its application to "at a trial." Virtually all authorities agree that even a lawyer who knows he is likely to be a necessary witness at trial is not prohibited from handling that matter throughout investigation, discovery and settlement negotiations, with client consent. *See, e.g., ABA Inf. Op. 89-1529 (1989); Pa. Ethics Op. 96-15 (1996).*

Since a significant number of cases, especially civil matters, never go to trial at all, the impact of Rule 3.7 is frequently negated.

Prior to being amended in 1987, what made the rule particularly onerous was the fact that it also applied vicariously to all members of the conflicted lawyer's firm. Thus, if a lawyer was a likely material witness in a case, her entire firm was prevented from handling a contested case. This resulted in far too many tactical maneuvers of listing an opposing counsel as a witness, which resulted in time-consuming motions to disqualify or to allow counsel to remain in a case. Many older lawyers remain unaware that the rule no longer contains this vicarious disqualification requirement.

When the ABA's Model Rules of Professional Conduct were adopted in Minnesota, Rule 3.7 replaced the former DR 5-102. Although the bar association's ad hoc committee that recommended the new rules called for an end to this vicarious disqualification (as did the Model Rule), the Supreme Court rejected this section and instead retained the language of the former DR. At least in Minnesota's initial version of the rule, therefore, the vicarious disqualification aspect remained.

Once the Model Rules were adopted in Minnesota, the U.S. District Court for the District of Minnesota adopted the state professional conduct rules as its own too.

Intellectual property lawyers in particular favored the less restrictive Model Rule approach, as they often were called upon to testify in contested federal patent application or infringement litigation. Only 18 months after the rule was adopted, the patent, trademark and copyright law committee of the Minnesota State Bar Association sought to have the rule amended.

Six months later, upon the MSBA's petition, the court amended the rule. Rule 3.7(b) was added so that even if a particular lawyer could not act as counsel at trial because she was to be a necessary witness, another lawyer in her firm could handle the trial instead.

Since this amendment was added, if this issue remains a major problem in the courts, it has not come to the attention of the Director's Office.

Hopefully, that is because without the ability to disqualify an entire firm, but only a particular lawyer, the potential tactical advantage of Rule 3.7 has been eroded, and thus it is not used nearly as often as before. As noted, our office receives occasional advisory opinion calls on this topic, most often to determine whether the caller's opponent can be disqualified.

Although the Director's Office does not give advisory opinions on opposing counsel conduct, we will point out relevant rules that are on point. When informed of the actual language of the rule, many such callers are surprised and disappointed. On the other hand, such a call (and now this article) just may have prevented a waste of valuable judicial resources.